

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 12, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILLIAM P.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:19-CV-71-FVS

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross motions for summary judgment. ECF Nos. 11, 15. This matter was submitted for consideration without oral argument. The Plaintiff is represented by Attorney D. James Tree. The Defendant is represented by Special Assistant United States Attorney Diana Andsager. The Court has reviewed the administrative record and the parties' completed briefing and is fully informed. For the reasons discussed below, the court **GRANTS** Defendant's Motion for Summary Judgment, ECF No. 15, and **DENIES** Plaintiff's Motion for Summary Judgment, ECF No. 11.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 **JURISDICTION**

2 Plaintiff William P.¹ protectively filed for supplemental security income on
3 February 17, 2012, alleging an onset date of May 8, 2008. Tr. 282-87. Benefits were
4 denied initially, Tr. 167-75, and upon reconsideration, Tr. 177-86. Plaintiff requested
5 a hearing before an administrative law judge (“ALJ”), which was held on December 3,
6 2013. Tr. 58-81. Plaintiff had representation and testified at the hearing. *Id.* The
7 ALJ denied benefits on May 13, 2014. Tr. 143-60. Plaintiff sought review of this
8 decision, and on March 7, 2016, the Appeals Council vacated the decision and
9 remanded the case for further proceedings. Tr. 161-64. Plaintiff testified at an
10 additional hearing on January 4, 2017. Tr. 82-112. The ALJ denied benefits, Tr. 12-
11 36, and the Appeals Council denied review. Tr. 1. The matter is now before this
12 Court pursuant to 42 U.S.C. § 1383(c)(3).

13 **BACKGROUND**

14 The facts of the case are set forth in the administrative hearing and transcripts,
15 the ALJ’s decision, and the briefs of Plaintiff and the Commissioner. Only the most
16 pertinent facts are summarized here.

17
18
19 _____
20 ¹ In the interest of protecting Plaintiff’s privacy, the Court will use Plaintiff’s first
21 name and last initial, and, subsequently, Plaintiff’s first name only, throughout this
decision.

1 Plaintiff was 43 years old at the time of the first hearing. Tr. 66. He stopped
2 going to school after the eighth grade, and testified that he was in special education
3 classes due to problems in reading and writing. Tr. 66-67. Plaintiff lives with his
4 mother. Tr. 72. He has work history as a cabinet assembler, forklift operator,
5 daycare worker, and jack hammer operator. Tr. 99-100. Plaintiff testified that he
6 cannot work because his wrist will start hurting and he will be unable to grip things.
7 Tr. 48, 90.

8 Plaintiff crashed his dirt bike in May 2008 and injured his right wrist. Tr. 68.
9 He had surgery two weeks later. Tr. 68. He reported that he cannot turn his wrist
10 over and has trouble gripping things with his right hand. Tr. 69, 74-75, 89. He
11 testified that he can use a screwdriver or a hammer for five minutes or so before his
12 wrist starts hurting. Tr. 92. Plaintiff also reported that his knees and hip are hurting
13 and at times his legs will shake uncontrollably. Tr. 77-78. He testified that he has
14 back pain, and he is being evaluated for sleep apnea. Tr. 96.

15 STANDARD OF REVIEW

16 A district court's review of a final decision of the Commissioner of Social
17 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
18 limited; the Commissioner's decision will be disturbed "only if it is not supported by
19 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
20 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
21 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and

1 citation omitted). Stated differently, substantial evidence equates to “more than a
2 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).
3 In determining whether the standard has been satisfied, a reviewing court must
4 consider the entire record as a whole rather than searching for supporting evidence in
5 isolation. *Id.*

6 In reviewing a denial of benefits, a district court may not substitute its
7 judgment for that of the Commissioner. If the evidence in the record “is susceptible
8 to more than one rational interpretation, [the court] must uphold the ALJ’s findings
9 if they are supported by inferences reasonably drawn from the record.” *Molina v.*
10 *Astrue*, 674 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not
11 reverse an ALJ’s decision on account of an error that is harmless.” *Id.* An error is
12 harmless “where it is inconsequential to the [ALJ’s] ultimate nondisability
13 determination.” *Id.* at 1115 (quotation and citation omitted). The party appealing
14 the ALJ’s decision generally bears the burden of establishing that it was harmed.
15 *Shinseki v. Sanders*, 556 U.S. 396, 409-10 (2009).

16 **FIVE-STEP SEQUENTIAL EVALUATION PROCESS**

17 A claimant must satisfy two conditions to be considered “disabled” within the
18 meaning of the Social Security Act. First, the claimant must be “unable to engage in
19 any substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or
21 can be expected to last for a continuous period of not less than twelve months.” 42

1 U.S.C. § 1382c(a)(3)(A). Second, the claimant’s impairment must be “of such
2 severity that he is not only unable to do his previous work[,] but cannot, considering
3 his age, education, and work experience, engage in any other kind of substantial
4 gainful work which exists in the national economy.” 42 U.S.C. § 1382c(a)(3)(B).

5
6 The Commissioner has established a five-step sequential analysis to determine
7 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v).
8 At step one, the Commissioner considers the claimant’s work activity. 20 C.F.R. §
9 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
10 Commissioner must find that the claimant is not disabled. 20 C.F.R. § 416.920(b).

11 If the claimant is not engaged in substantial gainful activity, the analysis
12 proceeds to step two. At this step, the Commissioner considers the severity of the
13 claimant’s impairment. 20 C.F.R. § 416.920(a)(4)(ii). If the claimant suffers from
14 “any impairment or combination of impairments which significantly limits [his or
15 her] physical or mental ability to do basic work activities,” the analysis proceeds to
16 step three. 20 C.F.R. § 416.920(c). If the claimant’s impairment does not satisfy
17 this severity threshold, however, the Commissioner must find that the claimant is not
18 disabled. 20 C.F.R. § 416.920(c).

19 At step three, the Commissioner compares the claimant’s impairment to
20 severe impairments recognized by the Commissioner to be so severe as to preclude a
21 person from engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(iii).

1 If the impairment is as severe or more severe than one of the enumerated
2 impairments, the Commissioner must find the claimant disabled and award benefits.
3 20 C.F.R. § 416.920(d).

4 If the severity of the claimant's impairment does not meet or exceed the
5 severity of the enumerated impairments, the Commissioner must pause to assess the
6 claimant's "residual functional capacity." Residual functional capacity (RFC),
7 defined generally as the claimant's ability to perform physical and mental work
8 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
9 416.945(a)(1), is relevant to both the fourth and fifth steps of the analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's
11 RFC, the claimant is capable of performing work that he or she has performed in the
12 past (past relevant work). 20 C.F.R. § 416.920(a)(4)(iv). If the claimant is capable
13 of performing past relevant work, the Commissioner must find that the claimant is
14 not disabled. 20 C.F.R. § 416.920(f). If the claimant is incapable of performing
15 such work, the analysis proceeds to step five.

16 At step five, the Commissioner considers whether, in view of the claimant's
17 RFC, the claimant is capable of performing other work in the national economy. 20
18 C.F.R. § 416.920(a)(4)(v). In making this determination, the Commissioner must
19 also consider vocational factors such as the claimant's age, education and past work
20 experience. 20 C.F.R. § 416.920(a)(4)(v). If the claimant is capable of adjusting to
21 other work, the Commissioner must find that the claimant is not disabled. 20 C.F.R.

1 § 416.920(g)(1). If the claimant is not capable of adjusting to other work, analysis
2 concludes with a finding that the claimant is disabled and is therefore entitled to
3 benefits. 20 C.F.R. § 416.920(g)(1).

4 The claimant bears the burden of proof at steps one through four above.
5 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
6 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
7 capable of performing other work; and (2) such work “exists in significant numbers
8 in the national economy.” 20 C.F.R. § 416.960(c)(2); *Beltran v. Astrue*, 700 F.3d
9 386, 389 (9th Cir. 2012).

10 **ALJ’S FINDINGS**

11 At step one, the ALJ found that Plaintiff has not engaged in substantial gainful
12 activity since February 17, 2012, the application date. Tr. 18. At step two, the ALJ
13 found that Plaintiff has the following severe impairments: learning disorder,
14 depressive disorder, and history of right-hand fracture in May 2008. Tr. 19. At step
15 three, the ALJ found that Plaintiff does not have an impairment or combination of
16 impairments that meets or medically equals the severity of a listed impairment. Tr.

17 19. The ALJ then found that Plaintiff has the RFC

18 to perform light work as defined in 20 CFR 416.967(b) except he is
19 limited to unskilled work; that is, work that can be learned in 30 days or
20 less. The work should require no more than simple, work related
21 decisions and should require few workplace changes. He is limited to
reading and writing at the 2nd and 3rd grade level. He can perform math
calculations at the 7th grade level. He is limited to frequent handling,
grasping, and fingering with the right upper extremity.

1 Tr. 21. At step four, the ALJ found that Plaintiff is unable to perform any past
2 relevant work. Tr. 27. At step five, the ALJ found that considering Plaintiff's age,
3 education, work experience, and RFC, there are jobs that exist in significant
4 numbers in the national economy that Plaintiff can perform, including: basket filler,
5 assembler, parking lot attendant, and cleaner. Tr. 28-29. On that basis, the ALJ
6 concluded that Plaintiff has not been under a disability, as defined in the Social
7 Security Act, since February 17, 2012, the date the application was filed. Tr. 29.

8 ISSUES

9 Plaintiff seeks judicial review of the Commissioner's final decision denying
10 her supplemental security income benefits under Title XVI of the Social Security
11 Act. ECF No. 11. Plaintiff raises the following issues for this Court's review:

- 12 1. Whether the ALJ properly considered Plaintiff's symptom claims;
- 13 2. Whether the ALJ properly weighed the medical opinion evidence; and
- 14 3. Whether the ALJ erred at step five.

15 DISCUSSION

16 A. Plaintiff's Symptom Claims

17 An ALJ engages in a two-step analysis when evaluating a claimant's
18 testimony regarding subjective pain or symptoms. "First, the ALJ must determine
19 whether there is objective medical evidence of an underlying impairment which
20 could reasonably be expected to produce the pain or other symptoms alleged."

21 *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not

1 required to show that her impairment could reasonably be expected to cause the
2 severity of the symptom he has alleged; he need only show that it could reasonably
3 have caused some degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591
4 (9th Cir. 2009) (internal quotation marks omitted).

5 Second, “[i]f the claimant meets the first test and there is no evidence of
6 malingering, the ALJ can only reject the claimant’s testimony about the severity of
7 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
8 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
9 citations and quotations omitted). “General findings are insufficient; rather, the ALJ
10 must identify what testimony is not credible and what evidence undermines the
11 claimant’s complaints.” *Id.* (quoting *Lester*, 81 F.3d at 834); *Thomas v. Barnhart*,
12 278 F.3d 947, 958 (9th Cir. 2002) (“[T]he ALJ must make a credibility
13 determination with findings sufficiently specific to permit the court to conclude that
14 the ALJ did not arbitrarily discredit claimant’s testimony.”). “The clear and
15 convincing [evidence] standard is the most demanding required in Social Security
16 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
17 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

18 Here, the ALJ found Plaintiff’s medically determinable impairments could
19 reasonably be expected to cause some of the alleged symptoms; however, Plaintiff’s
20 “statements concerning the intensity, persistence and limiting effects of these
21

1 symptoms are not entirely consistent with the medical evidence and other evidence
2 in the record” for several reasons. Tr. 22.

3 *1. Lack of Objective Medical Evidence*

4 First, the ALJ noted that while the medical evidence “indicates restrictions (as
5 reflected in the residual functional capacity), it does not show the level of
6 impairment alleged by [Plaintiff].” Tr. 22. An ALJ may not discredit a claimant’s
7 pain testimony and deny benefits solely because the degree of pain alleged is not
8 supported by objective medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857
9 (9th Cir. 2001); *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v.*
10 *Bowen*, 885 F.2d 597, 601 (9th Cir. 1989). However, the medical evidence is a
11 relevant factor in determining the severity of a claimant’s pain and its disabling
12 effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. § 404.1529(c)(2).

13 Here, the ALJ set out the medical evidence contradicting Plaintiff’s claims of
14 disabling limitations. As to his claimed physical impairments,² the ALJ noted that

15 _____
16 ² The ALJ’s decision also found that despite evidence of restrictions based on
17 Plaintiff’s cognitive limitations, he could still perform unskilled work, and the
18 “overall record does not suggest more restrictions than those in the [assessed RFC].”
19 Tr. 23. However, the Court declines to address Plaintiff’s claimed mental
20 limitations because they were not identified or challenged with specificity in
21 Plaintiff’s opening brief. *Carmickle*, 533 F.3d at 1161 n.2..

1 after Plaintiff's right wrist surgery in May 2008, the record includes notes of
2 "progressively improving pain, range of motion, and grip," and February 2010 x-
3 rays showed good positioning with good fixation and no evidence of loosening. Tr.
4 22-23 (citing Tr. 415-48, 452-53, 506); *see also Tommasetti*, 533 F.3d at 1040 (a
5 favorable response to treatment can undermine a claimant's complaints of
6 debilitating pain or other severe limitations). The ALJ further noted that Plaintiff
7 complained about wrist problems during disability evaluations, but treatment notes
8 "made little to no mention of [wrist] symptoms in treatment notes. Indeed,
9 [Plaintiff] denied all musculoskeletal problems in the most recent notes of record."
10 Tr. 23 (citing Tr. 510, 689-93, 736-48, 752, 759, 767-77); *see Burch*, 400 F.3d at
11 680 (minimal objective evidence is a factor which may be relied upon in discrediting
12 a claimant's testimony, although it may not be the only factor). Finally, the ALJ
13 found that objective examination findings of Plaintiff's wrist "revealed normal or
14 only minimally abnormal findings," including: normal strength, normal sensation,
15 and no erythema or warmth of joint. Tr. 23, 510, 655, 675, 682, 698, 711, 717, 728,
16 730, 738, 752. Thus, the ALJ concluded that the medical evidence "is inconsistent
17 with [Plaintiff's] testimony that his wrist range of motion is severely limited; his
18 wrist is 'frozen'; and he has problems with gripping and manipulation due to pain."
19 Tr. 23.

20 Plaintiff argues that "[w]hile the ALJ infers [that Plaintiff's lack of reported
21 symptoms] is because [his] wrist impairment was less severe than he was reporting

1 to Social Security, his treatment records reflect that his condition simply reached a
2 plateau and he ran out of options to help his condition.” ECF No. 11 at 12. In
3 support of this argument, Plaintiff cites findings by treatment providers that his right
4 wrist was “unlikely to improve” and “has certainly maxed out as far as range of
5 motion is concerned.” ECF No. 11 at 12-13 (citing Tr. 453, 561). Plaintiff further
6 references Social Security Regulations that direct an ALJ to “consider possible
7 reasons [he] may not comply with treatment or seek treatment consistent with the
8 degree of [his] complaints,” which might include advice from a medical source that
9 “there is no further effective treatment to prescribe or recommend that would benefit
10 the individual.” Social Security Regulation (“SSR”) 16-3p, 2016 WL 1119029 at *9
11 (Mar. 16, 2016). However, in this case, the ALJ does not reject Plaintiff’s physical
12 symptom claims because he failed to seek treatment; rather, the ALJ notes that when
13 Plaintiff sought treatment he “often made no mention of such symptoms.” Tr. 23.
14 Moreover, regardless of the consistency of Plaintiff’s complaints, it was reasonable
15 for the ALJ to find the severity of Plaintiff’s physical symptom claims was
16 inconsistent with objective medical evidence. “[W]here evidence is susceptible to
17 more than one rational interpretation, it is the [Commissioner’s] conclusion that
18 must be upheld.” *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). The
19 lack of corroboration of Plaintiff’s claimed limitations by the medical evidence was
20 a clear and convincing reason for the ALJ to discount Plaintiff’s symptom claims.

21 *2. Daily Activities*

1 Second, the ALJ found Plaintiff's "activities of daily living are inconsistent
2 with his allegations regarding right hand limitations." Tr. 24. A claimant need not
3 be utterly incapacitated in order to be eligible for benefits. *Fair*, 885 F.2d at 603;
4 *see also Orn*, 495 F.3d at 639 ("the mere fact that a plaintiff has carried on certain
5 activities . . . does not in any way detract from her credibility as to her overall
6 disability."). Regardless, even where daily activities "suggest some difficulty
7 functioning, they may be grounds for discrediting the [Plaintiff's] testimony to the
8 extent that they contradict claims of a totally debilitating impairment." *Molina*, 674
9 F.3d at 1113.

10 In support of this finding, the ALJ found Plaintiff's "ability to drive on a
11 regular basis is not entirely consistent with his allegations of upper extremity
12 limitations," because driving "reasonably requires use of the upper extremities to
13 grip and turn the steering wheel and to operate the turn signals, wipers, heating and
14 cooling." Tr. 24, 67, 341. The ALJ additionally cited evidence that Plaintiff
15 provided caregiving for his mother, including running errands, cooking, household
16 cleaning and other chores; cared for three horses and a dog; went to town to shop
17 and attend appointments; mowed the yard; and attended to his personal care. Tr. 24
18 (citing Tr. 339-41, 381, 477, 489).

19 Plaintiff briefly argues that "the ALJ fails to consider the differences between
20 self-paced chores and the requirements of a competitive work environment. For
21 instance, [Plaintiff] testified that feeding the horses took him 20 to 30 minutes after

1 injuring his hand; prior to his accident, it took him only a couple of minutes.” ECF
2 No. 11 at 13 (citing Tr. 70). However, regardless of evidence that could be viewed
3 more favorably to Plaintiff, it was reasonable for the ALJ to conclude that Plaintiff’s
4 documented daily activities, including caring for his mother and horses on a daily
5 basis, was inconsistent with his allegations of incapacitating limitations. Tr. 28;
6 *Molina*, 674 F.3d at 1113 (Plaintiff’s activities may be grounds for discrediting
7 Plaintiff’s testimony to the extent that they contradict claims of a totally debilitating
8 impairment); *See Burch*, 400 F.3d at 679 (where evidence is susceptible to more
9 than one interpretation, the ALJ’s conclusion must be upheld). This was a clear and
10 convincing reason to discredit Plaintiff’s symptom claims

11 3. *Additional Reasons*

12 Finally, the ALJ noted that (1) Plaintiff “was able to work with his cognitive
13 restrictions, which suggests that they do not cause more restrictions than those
14 accommodated” in the assessed RFC, and (2) Plaintiff’s “unemployed status during
15 most, if not all, of the relevant period was largely due to factors other than his
16 alleged physical and mental impairments.” Tr. 24-25. Generally, the ability to work
17 can be considered in assessing credibility. *Bray v. Comm’r Social Security Admin.*,
18 554 F.3d 1219, 1227 (9th Cir. 2009). Moreover, it was reasonable for the ALJ to
19 consider Plaintiff’s report in July 2016 that he was not working because he was
20 caring for his mother. Tr. 25, 381; *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir.
21 2001) (an ALJ may consider that a claimant stopped working for reasons unrelated

1 to the allegedly disabling condition when weighing the Plaintiff's symptom reports).
2 However, the Court declines to consider these reasons because Plaintiff does not
3 identify or challenge them in his opening brief. *See Kim v. Kang*, 154 F.3d 996,
4 1000 (9th Cir. 1998) (the Court may not consider on appeal issues not “specifically
5 and distinctly argued” in the party’s opening brief).

6 The Court concludes that the ALJ provided clear and convincing reasons,
7 supported by substantial evidence, for rejecting Plaintiff’s symptom claims.

8 **B. Medical Opinions**

9 There are three types of physicians: “(1) those who treat the claimant (treating
10 physicians); (2) those who examine but do not treat the claimant (examining
11 physicians); and (3) those who neither examine nor treat the claimant [but who
12 review the claimant's file] (nonexamining [or reviewing] physicians).” *Holohan v.*
13 *Massanari*, 246 F.3d 1195, 1201–02 (9th Cir. 2001) (citations omitted). Generally, a
14 treating physician's opinion carries more weight than an examining physician's, and
15 an examining physician's opinion carries more weight than a reviewing physician's.
16 *Id.* If a treating or examining physician's opinion is uncontradicted, the ALJ may
17 reject it only by offering “clear and convincing reasons that are supported by
18 substantial evidence.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir.2005).
19 Conversely, “[i]f a treating or examining doctor's opinion is contradicted by another
20 doctor's opinion, an ALJ may only reject it by providing specific and legitimate
21 reasons that are supported by substantial evidence.” *Id.* (citing *Lester v. Chater*, 81

1 F.3d 821, 830-31 (9th Cir. 1995)). “However, the ALJ need not accept the opinion
2 of any physician, including a treating physician, if that opinion is brief, conclusory
3 and inadequately supported by clinical findings.” *Bray v. Comm’r of Soc. Sec.*
4 *Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009) (quotation and citation omitted).

5 Plaintiff argues the ALJ erroneously considered the opinions of treating
6 physician, Jeremiah Crank, M.D. and treating physician Vanugopal Bellum, M.D.
7 ECF No. 11 at 7-11. The ALJ jointly considered these opinions; thus, the Court will
8 do the same. In June 2014, and again in January 2016, Dr. Jeremiah Crank opined
9 that due to lower back pain with radiculopathy, and right wrist pain “after surgery
10 for fracture,” Plaintiff was limited to sedentary work and had marked limitations in
11 his ability to sit, stand, walk, lift, carry, handle, push, pull, reach, stoop, and crouch.
12 Tr. 651-60. In March 2012, Dr. Vanugopal Bellum opined that Plaintiff could stand
13 for six hours in an eight hour day; sit for prolonged periods with occasional pushing
14 and pulling of arm or leg controls; sit for most of the day, walking or standing for
15 brief periods; lift a maximum of ten pounds; and frequently lift or carry two

1 pounds.³ Tr. 628-29. The ALJ collectively gave “less weight” to Dr. Crank⁴ and
2 Dr. Bellum’s opinions for several reasons. Tr. 25-26.

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5 _____
6 ³ The record also includes a February 2015 opinion from Dr. Crank, a May 2010
7 opinion from Dr. Bellum, and an August 2010 opinion from Dr. Bellum. Tr. 596-
8 602, 707-11. However, the Court declines to address these opinions as they are not
9 identified or challenged with specificity in Plaintiff’s opening brief. *Carmickle*, 533
10 F.3d at 1161 n.2.

11 ⁴ Plaintiff argues that Dr. Crank’s opinions are uncontradicted in the record because
12 they were assessed after “Plaintiff’s lumbar radiculopathy was documented in the
13 record. . . . Therefore, [Dr.] Crank’s opinion is uncontradicted in the record and
14 convincing reasons are needed to reject his opinion.” ECF No. 11 at 7. As noted
15 above, if a treating or examining physician's opinion is uncontradicted, the ALJ may
16 reject it only by offering “clear and convincing reasons that are supported by
17 substantial evidence.” *Bayliss*, 427 F.3d at 1216. However, “[i]f a treating or
18 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ may
19 only reject it by providing specific and legitimate reasons that are supported by
20 substantial evidence.” *Id.* (citing *Lester v. Chater*, 81 F.3d 821, 830-31) The Court
21 finds it unnecessary to address this distinction, because as discussed herein, the ALJ
properly weighed the opinion evidence under either standard.

1 First, the ALJ found that “[a]lthough treating provider opinions are usually
2 afforded more weight, [the ALJ gave] little weight to the opinions because neither
3 doctor provided complete evaluations with objective findings consistent with such
4 limitations. Nor do their treatment notes contain findings consistent with such
5 severe restriction.” Tr. 25. Similarly, the ALJ found that Dr. Bellum did not
6 provide objective evidence consistent with his March 2012 opinion, particularly as
7 to how Plaintiff’s limitations worsened from being able to perform a full range of
8 light work in February 2011, to being limited to less than sedentary work in March
9 2012. Tr. 26, 494-95, 628-29.

10 The ALJ may properly reject a medical opinion if it is inconsistent with the
11 provider's own treatment notes. *Tommasetti*, 533 F.3d at 1041; see also *Batson v.*
12 *Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) (An ALJ may
13 discount an opinion that is conclusory, brief, and unsupported by the record as a
14 whole, or by objective medical findings). In support of this finding, the ALJ found
15 “most of [the treating physicians’] findings were unremarkable, and included normal
16 wrist/hand range of motion.” Tr. 25-26 (citing Tr. 506, 510, 597, 655, 660, 711).

17 First, Plaintiff argues the ALJ “ignored” Dr. Crank’s January 2016 evaluation
18 of Plaintiff, “where he diagnosed him with ‘lumbar radiculopathy’ and noted that
19 degenerative changes were seen on x-ray”; noted that Plaintiff’s lumbar and
20 paralumbar were tender to palpation; and noted that Plaintiff had positive straight leg
21 test. ECF No. 11 at 7-8 (citing Tr. 669, 675). However, the Court’s review of the

1 ALJ's decision indicates that he did acknowledge Plaintiff's reports of tenderness to
2 palpation, and he considered the only objective imaging study of record, a July 2013
3 x-ray indicating "mild degenerative changes at L1-2 and 2-3 disc levels." Tr. 19
4 (citing Tr. 675, 681, 688, 692, 732, 752). Second, Plaintiff generally argued that the
5 ALJ "fail[ed] to note that Dr. Bellum's [March 2012] opinion was based on an
6 ongoing treatment relationship with [Plaintiff] and the review of medical records
7 from other professionals." ECF No. 11 at 10-11. However, as noted above, the ALJ
8 cited evidence of unremarkable findings in Dr. Bellum's treatment notes at the time
9 of his March 2012 opinion, including good range of motion at the elbow and wrist.
10 Tr. 25, 510. Moreover, the Court is unable to discern, nor does Plaintiff specifically
11 reference, evidence to support Plaintiff's contention that Dr. Bellum reviewed
12 medical records from "other professionals." *See* ECF No. 11 at 10.

13 Based on the foregoing, and regardless of evidence that might be considered
14 more favorable to Plaintiff, it was reasonable for the ALJ to find that the overall
15 objective examinations and clinical findings in Dr. Crank and Dr. Bellum's own
16 treatment notes were inconsistent with the severity of the limitations they assessed.
17 *See Burch*, 400 F.3d at 679 (where evidence is susceptible to more than one
18 interpretation, the ALJ's conclusion must be upheld).

19 Second, the ALJ found Dr. Crank and Dr. Bellum's opinions were
20 "inconsistent with the longitudinal medical evidence . . . , which, in addition to
21 reflecting little to no right upper extremity restriction, does not show that

1 [Plaintiff's] alleged back pain constitutes a severe impairment." Tr. 26. The
2 consistency of a medical opinion with the record as a whole is a relevant factor in
3 evaluating that medical opinion. *Orn*, 495 F.3d at 631. As an initial matter, Plaintiff
4 argues that his "diagnosis of lumbar radiculopathy and abnormal findings on exam
5 were not considered by the ALJ and are inconsistent with the finding that [Plaintiff]
6 did not have a 'severe' back impairment." ECF No. 11 at 9. Plaintiff further
7 contends that the ALJ's "errors are not harmless as the ALJ inappropriately used the
8 lack of a step two finding to reject Dr. Crank's opinion." ECF No. 11 at 9.
9 However, aside from this mention of the step two findings as part of Plaintiff's
10 argument regarding the ALJ's consideration of the medical opinion evidence,
11 Plaintiff fails to raise the step two issue in his opening brief. *See Kim*, 154 F.3d at
12 1000 (the Court may not consider on appeal issues not "specifically and distinctly
13 argued" in the party's opening brief). Regardless, to the extent that he does properly
14 raise a step two challenge, the Court notes that the ALJ did consider the objective
15 and clinical findings regarding Plaintiff's allegations of back pain at step two, and
16 found that "regardless of whether [he found] back pain a severe impairment, the
17 overall record does not reflect more functional restrictions than those accommodated
18 in the [RFC]." Tr. 19. Thus, any error in considering Plaintiff's back impairment at
19 step two would be harmless because the ALJ ultimately resolved step two in
20 Plaintiff's favor, proceeded with the five-step analysis, and crafted an RFC based on
21

1 all of Plaintiff's supported limitations. *See Stout v. Comm'r of Soc. Sec. Admin.*, 454
2 F.3d 1050, 1055 (9th Cir. 2006); *Burch*, 400 F.3d at 682.

3 Plaintiff additionally argues that (1) the longitudinal record included diagnosis
4 of "lumbar radiculopathy" by multiple treatment providers; and (2) the ALJ's
5 finding that "[a]part from reports of tenderness to palpation, most records show little
6 to no abnormality in any area, including gait and lower extremity strength and
7 sensation" was an "inaccurate assessment of Plaintiff's medical history." ECF No.
8 11 at 8-9; Tr. 19. In support of this argument, Plaintiff cites diagnoses of "lumbar
9 radiculopathy," and a single treatment note by Dr. Jeffrey Ventre in July 2013 that
10 noted Plaintiff's "left leg shook uncontrollably," and upon examination found
11 painful palpation to the left SI joint, mildly positive straight leg raise on the left,
12 "pinwheel sensation patchy at left leg," and positive Yeoman's test, left greater than
13 right. Tr. 729-30. First, the Court's review of the record indicates that
14 "uncontrollable shaking" of the left leg was solely based on Plaintiff's own report,
15 and Dr. Ventre also noted no recent imaging was available, musculature and
16 extremities were normal, gait was normal, muscle tone was normal, leg strength was
17 normal, and facet loading test was negative. Tr. 730. Moreover, the ALJ
18 specifically cited examinations throughout the longitudinal record that found "little
19 to no abnormality in any area, including gait and lower extremity strength and
20 sensation. There were no findings of atrophy and [Plaintiff] typically exhibited only
21 [] minimal range of motion deficits." Tr. 19 (citing Tr. 643-44, 654, 659, 675, 681,

1 688, 698, 752, 768). Based on the foregoing, and regardless of evidence that could
2 be considered more favorable to Plaintiff, it was reasonable for the ALJ to find that
3 Dr. Crank and Dr. Bellum’s opinions are inconsistent with the longitudinal medical
4 evidence.

5 Third, the ALJ found “the opinions of Dr. Bellum and Dr. Crank seem
6 inconsistent with [Plaintiff’s] daily activities.” Tr. 26. An ALJ may discount a
7 medical opinion that is inconsistent with a claimant's reported functioning. *See*
8 *Morgan v. Comm’r of Soc. Sec. Admin*, 169 F.3d 595, 601-02 (1999). In support of
9 this finding, the ALJ noted that Plaintiff cared for his mother, drove a vehicle, and
10 took care of three horses. Tr. 26. Plaintiff argues that “[w]ith no further
11 explanation, it is not clear how [Plaintiff’s] activities are inconsistent with Dr.
12 Crank’s restriction to a sedentary job.” ECF No. 11 at 9-10 (citing *Garrison*, 759
13 F.3d at 1012 (“[t]he ALJ must do more than state conclusions. He must set forth his
14 own interpretations and explain why they, rather than the doctors’, are correct.”)).
15 The Court finds it was reasonable for the ALJ to find Dr. Crank and Dr. Bellum’s
16 assessment that Plaintiff was limited to sedentary or less than sedentary work, and
17 that he had “notable manipulative restrictions” based on alleged wrist and back
18 impairments, was inconsistent with his ability to care for people and animals on a
19 daily basis, and drive a car. *See Tommasetti*, 533 F.3d at 1040 (ALJ may draw
20 inferences logically flowing from evidence); *Magallanes v. Bowen*, 881 F.2d 747,
21 755 (9th Cir. 1989). Moreover, even assuming the ALJ erred in failing to make

1 specific enough findings on this issue, any error is harmless because, as discussed
2 above, the ALJ’s ultimate rejection of these treating opinions was supported by
3 substantial evidence. *See Carmickle*, 533 F.3d at 1162-63.

4 For all of these reasons, the Court finds the ALJ did not err in considering Dr.
5 Crank and Dr. Bellum’s opinions.

6 C. Step Five

7 At step five of the sequential evaluation analysis, the burden shifts to the
8 Commissioner to prove that, based on the claimant's residual functional capacity,
9 age, education, and past work experience, he or she can do other work. *Bowen v.*
10 *Yuckert*, 482 U.S. 137, 142 (1987); 20 C.F.R. §§ 416.920(g), 416.960(c). The
11 Commissioner may carry this burden by “eliciting the testimony of a vocational
12 expert in response to a hypothetical that sets out all the limitations and restrictions of
13 the claimant.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The
14 vocational expert may testify as to: (1) what jobs the claimant, given his or her
15 residual functional capacity, would be able to do; and (2) the availability of such
16 jobs in the national economy. *Tackett*, 180 F.3d at 1101. If the claimant can
17 perform jobs which exist in significant numbers either in the region where the
18 claimant lives or in the national economy, the claimant is not disabled. 42 U.S.C. §§
19 423(d)(2)(a), 1382c(a)(3)(b). The burden of establishing that there exists other work
20 in “significant numbers” lies with the Commissioner. *Tackett*, 180 F.3d at 1099.

1 Here, in response to vocational interrogatories, the vocational expert
2 considered two hypotheticals proposed by the ALJ. First, the ALJ proposed
3 “hypothetical A” as follows:

4 Assume a hypothetical individual who was born on March 20, 1970,
5 has a limited education and is able to communicate in English as
6 defined in 20 CFR 404.1564 and 416.964, and has work experience as
7 described [in the vocational interrogatory responses]. Assume further
8 that this individual has the [RFC] to perform light work as defined in
9 20 CFR 404.1567(b) and 416.967(b) except the individual is limited to
unskilled work; that is, work that can be learned in 30 days or less. The
work should require no more than simple, work related decisions. The
work should require few workplace changes. The individual is limited
to reading and writing at the 2nd to 3rd grade level. The individual can
perform math calculations at the 7th grade level.

10 Tr. 403. In response to this hypothetical, the vocational expert indicated that an
11 individual as described in hypothetical A could perform Plaintiff’s past job of
12 childcare provider. Tr. 403. The vocational expert further opined that an individual
13 described in hypothetical A “could not perform any unskilled occupations with jobs
14 that exist in the national economy.” Tr. 404.

15 As noted by Plaintiff, “the ALJ also proposed hypothetical B, which was
16 identical to hypothetical A except that additional manipulative limitations were
17 added,” specifically, “[t]he individual would be limited to frequent handling,
18 grasping, and fingering with the right upper extremity.” ECF No. 11 at 16 (citing
19 Tr. 404). In response to hypothetical B, the vocational expert opined that this
20 individual could not perform any past jobs because they are “above light and beyond
21 GED of 1st or 2nd level.” Tr. 405. In addition, in response to hypothetical B, the

1 vocational expert testified that this individual could perform unskilled occupations
2 with jobs that exist in the national economy, including: basket filler (SVP 1, 452,000
3 in the national economy), assembler (SVP 1, 1,555,000 jobs in the national
4 economy), parking lot attendant (booth) (SVP 2, 113,490 jobs in the national
5 economy), and cleaner/maid (SVP 2, 3,398,000 jobs in the national economy). Tr.
6 405.

7 Plaintiff argues the ALJ did not meet his burden at step five because he failed
8 to reconcile several inconsistencies in the vocational expert testimony. ECF No. 11
9 at 14-18. “When there is an apparent conflict between the vocational expert’s
10 testimony and the DOT - for example, expert testimony that a claimant can perform
11 an occupation involving DOT requirements that appear more than the claimant can
12 handle-the ALJ is required to reconcile the inconsistency .” *Zavalin v. Colvin*, 778
13 F.3d 842, 846 (9th Cir. 2015). The ALJ must ask the expert to explain the conflict
14 and “then determine whether the vocational expert’s explanation for the conflict is
15 reasonable” before relying on the expert’s testimony to reach a determination. *Id.*

16 Here, the vocational expert testified at the hearing that if a person was only
17 able to read at a second or third grade level, “[t]hat would be an SVP of 1.” Tr. 110.
18 Plaintiff contends this testimony is inconsistent with the vocational expert’s response
19 to vocational interrogatories that Plaintiff “could perform jobs as a parking lot
20 attendant and cleaner/maid, both with an SVP of 2.” ECF No. 11 at 17 (citing Tr.
21 405). The Court agrees. However, as noted by Defendant, even assuming the ALJ

1 erred in this reasoning, any error is harmless because “the ALJ identified two other
2 SVP 1 jobs, both of which existed in significant numbers,” basket filler (SVP 1,
3 452,000 in the national economy), and assembler (SVP 1, 1,555,000 jobs in the
4 national economy). ECF No. 15 at 11; Tr. 29. It is well-settled in the Ninth Circuit
5 that the number of basket filler and assembler jobs identified by the vocational
6 expert qualify, respectively, is a significant number of jobs available in the national
7 economy. Tr. 29; *see Gutierrez*, 740 F.3d at 529 (finding 25,000 jobs in the national
8 economy was a significant number). Thus, the Court finds no harmful error in the
9 ALJ’s reliance on this portion of vocational expert’s testimony. *Molina*, 674 F.3d at
10 1111 (an error is harmless “where it is inconsequential to the [ALJ’s] ultimate
11 nondisability determination”).

12 Plaintiff also noted that the vocational expert testified that the individual in
13 hypothetical A would be unable to perform any unskilled work; then, in stark
14 contrast, the vocational expert found the individual in hypothetical B, who had
15 identical limitations as the individual in hypothetical A but with the added restriction
16 to “frequent handling, grasping, and fingering with the right upper extremity,” would
17 be able to perform unskilled work as a basket filler, assembler, parking lot attendant,
18 and cleaner. Tr. 29, 403-405. Plaintiff argues “[i]t defies logic that additional
19 limitations would make a person able to perform more work, and raise[s] a serious
20 question about the validity of the vocational expert testimony.” ECF No. 11 at 17.
21 Defendant asserts that this discrepancy “appears to be a clerical error,” and

1 additionally argues that “the ALJ based his step five finding on the expert’s response
2 to Hypothetical B, not A, and thus this clerical error has no bearing on the ultimate
3 finding that plaintiff could perform a significant number of jobs at step five in
4 response to Hypothetical B.” ECF No. 15 at 12 (citing Tr. 21, 29). The Court
5 agrees.

6 Here, the assessed RFC contains identical limitations to those proposed by the
7 ALJ in hypothetical B. Tr. 21, 404. Thus, even assuming, *arguendo*, that the ALJ
8 erred in considering whether the individual in hypothetical A could perform
9 unskilled work, this error is harmless because the ALJ properly relied on the
10 vocational expert’s testimony that an individual as described in hypothetical B could
11 perform a significant number of jobs in the national economy. Tr. 29, 404; *Molina*,
12 674 F.3d at 1111 (an error is harmless “where it is inconsequential to the [ALJ’s]
13 ultimate nondisability determination”). Moreover, Plaintiff fails to identify any
14 unresolved inconsistency between the DOT and the vocational expert’s testimony
15 regarding hypothetical B. *See Zavalin*, 778 F.3d at 846 (the ALJ is required to
16 reconcile any inconsistency between the DOT and vocational expert testimony). For
17 all of these reasons, the Court finds no error in the ALJ’s ultimate step five
18 determination.

19 CONCLUSION

20 A reviewing court should not substitute its assessment of the evidence for the
21 ALJ’s. *Tackett*, 180 F.3d at 1098. To the contrary, a reviewing court must defer to

1 an ALJ's assessment as long as it is supported by substantial evidence. 42 U.S.C. §
2 405(g). As discussed in detail above, the ALJ provided clear and convincing
3 reasons to discount Plaintiff's symptom claims, properly weighed the medical
4 opinion evidence, and did not err at step five. After review the court finds the ALJ's
5 decision is supported by substantial evidence and free of harmful legal error.

6 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 11**, is **DENIED**.
- 8 2. Defendant's Motion for Summary Judgment, **ECF No. 15**, is **GRANTED**.

9 The District Court Clerk is directed to enter this Order and provide copies to
10 counsel. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

11 **DATED** March 12, 2020.

12
13 *s/ Rosanna Malouf Peterson*
14 ROSANNA MALOUF PETERSON
15 United States District Judge
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